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## Taking Myths Seriously: An Essay For Lawyers

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# TAKING MYTHS SERIOUSLY: AN ESSAY FOR LAWYERS

DONALD C. LANGEVOORT\*

## INTRODUCTION

Consider the following claim: Much of what people believe is based on insufficient empirical observation, and thus often inaccurate. Yet their level of confidence in those beliefs is not adjusted downward enough to reflect the risk of inaccuracy. In other words, many beliefs relating to the state of the world are confidently held illusions or—in a sufficiently dramatic setting—myths.<sup>1</sup>

This idea is hardly original; indeed, it is a stock insight of contemporary social thought. Still, I want to pursue the idea more deeply here, largely because lawyers do not really take it very seriously. To be sure, legal authors endlessly challenge other people's "myths" and "illusions." But the words are used mainly as a form of name-calling, to connote naivete or foolishness on the part of the believers or disingenuousness by those who propagate the belief. To these writers, myth means no more than popular misconception, and this fails to do justice to what is a much richer, and more complicated idea.

Because understanding human inference and judgment is a fundamental research agenda in all the social sciences, the scholarly literature dealing with them is vast. Cognitive psychologists study it at the level of individual brain function and processing. In turn, because cognition and inference are social acts, they are also studied

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1. Some definitional points: First, I am using the term "belief" here loosely, to mean some mental representation of the state of the world in which the holder is confident. This is not the same as certainty; one can believe something even while conceding that it *might* not be true. It is the confidence that is important, and I suspect (for reasons that should become clear) that the appropriate level of confidence is something measured viscerally, not in terms of probabilities. My use of the term "myth" is fairly synonymous—it is something, usually of high cultural or personal significance, that is strongly believed in the face of limited knowledge. Consistent with the views of most scholars of myth, I do not want to equate myth with falsity. See, e.g., WENDY DONIGER, *THE IMPLIED SPIDER: POLITICS AND THEOLOGY IN MYTH* 4 (1998).

by social psychologists under the heading of “social cognition.” Social cognition then blends into mainstream sociology in the form of “social constructionism” in the Berger and Luckmann genre,<sup>2</sup> and from there into almost all of postmodernism.<sup>3</sup> Like most everyone, I must confess readily to having read only a tiny fraction of the cognitive research in all these various disciplines, which for all its bulk is still fairly tentative, far from any convincingly documented grand theory of human nature. All I have done is to learn enough to be intrigued both by the individual claims and some of the thematic connections.

The specific idea I want to explore has to do with the motivational power of myths and illusions on a personal level. To take a mundane example, people are often told to “believe in themselves.” The underlying idea seems to be that high self-confidence is an important motivator, especially in competitive settings like school, sports, business and the professions. This is not the idle talk of family and friends; millions of dollars are spent each year by people and their employers on motivational books and programs that offer endless variations on this simple theme in an effort to bolster the self-confidence of the audience. Yet the idea is intellectually vacant, except to the very limited extent that it is meant to correct a given person’s erroneous belief that he or she lacks the skill to compete when in fact that skill is present. There are plenty of reasons why one may not meet high expectations, no matter how hard one believes or tries, and, rationally, there is never reason to ignore or downplay the realistic risk of failure. Is it possible, however, that there is something more to motivation, so that the myopic act of “believing in oneself” actually can pay off on average even if it is induced largely through some form of psychological cheerleading? Are there unrealistic beliefs in things besides oneself for which there are similar motivational payoffs? And importantly, is there a price—personal or social—paid as a result? What follows offers some

2. See PETER BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966). For an interesting review of more recent work, see Paul DiMaggio, *Culture and Cognition*, 23 ANN. REV. SOC. 263 (1997).

3. It also enters into nearly every other discipline within the social sciences. Notwithstanding economics’ historic commitment to the observation of outcomes rather than decision-processes, the cognitive dimension of research into economic behavior is becoming increasingly prominent there, too. See, e.g., Matthew Rabin, *Psychology and Economics*, 36 J. ECON. LITERATURE 11 (1998). Contemporary research in organization theory is also heavily directed toward the study of how large groups perceive their environments and act in response to these perceptions. See, e.g., James P. Walsh, *Managerial and Organizational Cognition: Notes from a Trip Down Memory Lane*, 6 ORG. SCI. 280 (1995).

tentative answers that relate to law and lawyering.

## I. MYTHS AND ILLUSIONS AS ANXIETY BUFFERS

To me, the most compelling theme in social cognition is this: Most social settings of interest and importance are characterized by a high degree of ambiguity. That ambiguity is highly stressful, especially in settings with a heavy goal-orientation in which significant decisions about the future have to be made. To reduce the anxiety, people unconsciously impose an order on their environment, a set of causal explanations that lead to an artificial, but more comfortable sense of predictability. As individuals, groups, organizations and cultures, people come to have greater confidence in their construals than is warranted empirically. And because of the continuing ambiguity in the feedback from the environment, this artificial confidence is often not subject to disconfirmation, and thus persists.

Again, this is nothing new. Social theory has long associated cultural mythmaking with the need to impose order and confidence in the face of mystery and chaos. To hope to make a contribution, then, I will move to the more local level, to explore group and personal “anxiety buffers” in micro-settings of special interest and importance to lawyers. Although there are doctrinal implications one can draw from this—and a part of what follows will make suggestions relating to the field of professional responsibility and the seemingly quixotic effort to make lawyers more virtuous—it is the *ex ante* use of this learning on which I will mainly concentrate. At their best, lawyers are problem-solvers.<sup>4</sup> They help their clients through unfamiliar and stressful situations, finding answers and solutions (most often through negotiation with others) that are satisfying enough to allow clients to turn their attention toward other matters. They help clients “satisfice,” to use Herbert Simon’s term, in a world of bounded rationality. The main value within law to understanding inference and decision-making better, then, is simply that lawyers are involved in so much difficult inference and decision-making in their own professional lives and the lives of their clients.

4. See, e.g., Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 LAW & CONTEMP. PROBS. 5 (1995); Carrie Menkel-Meadow, *Taking Problem-Solving Pedagogy Seriously: A Response to the Attorney General*, 49 J. LEGAL EDUC. 14 (1999).

### A. *Individual Sense-Making*

Even within psychology, the processes by which people make sense of their environments is the subject of study from a set of often inconsistent research agendas. For many, the organizing metaphor is the human mind as a computer-like information processor. Within this genre, some researchers probe for evidence of consistent rationality. Others—the recently celebrated “heuristics and biases” branch of the study of judgment and decision-making<sup>5</sup>—look for mental models that are prone to predictable error, even if they are useful and adaptive much of the time. Still others use different images. Social cognition may be described, for example, by invoking the image of people as “intuitive politicians,”<sup>6</sup> or even “intuitive lawyers.”<sup>7</sup>

Whatever the preferred metaphor, the majority of psychologists see the process of sense-making as a highly creative task. That is to say, the amount of data available to the individual in most situations is far short of that necessary for inference that meets anything resembling well-grounded empiricism, and the mind lacks the capacity to process all of that which is available. Hence, through a variety of shortcuts, the mind fills in the gaps. That much is not very controversial. The divisive question is what drives the gap-filling.

Some psychologists contend that all that drives it are the very demands of simplification. There is a large literature that locates heuristic processes simply within the framework of limited data and limited processing capacity: these are cold, cognitive traits that are no more than the best available methods of sense-making.<sup>8</sup> But I find myself drawn to the research that treats people as strongly *needing* to make sense of things, so that the creative gap-filling is driven by the demand for greater certainty than nature will otherwise allow. Such certainty, illusory or not, is an antidote to stress and anxiety.

5. This literature has become very popular among legal academics. See e.g., Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989); Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175 (1997). For a survey, see Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998).

6. See, e.g., Philip E. Tetlock, *An Alternative Metaphor in the Study of Judgment and Choice: People as Politicians*, 1 THEORY & PSYCHOL. 451 (1991).

7. See, e.g., Roy F. Baumeister & Leonard S. Newman, *Self-Regulation of Cognitive Inference and Decision Processes*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 3 (1994).

8. See RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 228-34 (1980).

Many of the well-known “heuristics and biases” fit nicely into such a motivational story. The tendency of people to find illusory correlations, and see trends where there really is no causation, is a good example. So is the hindsight bias, the tendency to overestimate the likelihood that one could have foreseen some future event once one is told that the event actually occurred.<sup>9</sup> The fundamental attribution bias says that people overestimate their ability to predict how another will act based on their knowledge of that person’s character and disposition, underestimating the influence of situational factors. Each of these supports a feeling of control through an illusory ability to predict more about the future than one really can.

What all these heuristics involve is a guess—on average, a good one. And it would be hard to make much of a motivational claim if people tended to recognize their inferences—and the process of sense-making—as the guesswork that it is. But another robust finding in the literature is that people develop higher levels of confidence in the accuracy of their inferences than is warranted. This is the famous “overconfidence effect,”<sup>10</sup> observed especially among American males. Asked to estimate their confidence in the accuracy of their judgments, people (including many experts)<sup>11</sup> usually estimate too high. While this, too, might be purely cognitive, I find irresistible the inference that the overconfidence is evolutionarily adaptive.

The evolutionary story, which can be told in terms of either economics<sup>12</sup> or biology,<sup>13</sup> is simple. Doubt and uncertainty are paralyzing. By contrast, the strong belief that one understands what is going on leads to more confident predictions, and hence action. Confidence is associated with initiative and persistence. What’s

9. For a legal audience, see Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998).

10. See MAX H. BAZERMAN, JUDGMENT IN MANAGERIAL DECISION MAKING 37-39, 46 (3d ed. 1994).

11. See Colin Camerer & Dan Lovallo, *Overconfidence and Excess Entry: An Experimental Approach*, 89 AM. ECON. REV. 306 (1999). In recent years, there has been a steady increase in the willingness of mainstream finance theorists to claim that overconfidence is an important factor in explaining stock price behavior. See, e.g., Kent Daniel et al., *Investor Psychology and Security Market Under- and Overreactions*, 53 J. FIN. 1839 (1998).

12. That is, seeing what traits will give their holder the best “survivorship” capacity within specific cultural or institutional settings. See generally Richard R. Nelson, *Recent Evolutionary Theorizing About Economic Change*, 33 J. ECON. LITERATURE 48 (1995).

13. In the sociobiology literature, confidence and optimism are closely related, and both are viewed as genetically favored. For the seminal study, see generally LIONEL TIGER, *OPTIMISM: THE BIOLOGY OF HOPE* (1979). For an approach combining biology and economics, see generally Michael Waldman, *Systematic Errors and the Theory of Natural Selection*, 84 AM. ECON. REV. 482 (1994).

more, it has a wonderful capacity to become a self-fulfilling prophecy. Not only will better events, on average, occur to those who show initiative and persistence, the reaction of others to displays of confidence often leads others to defer and let the confident person lead.<sup>14</sup> There is a story told by Albert Szent-Gyorti that captures this perfectly.<sup>15</sup> A platoon of soldiers during World War II was lost in the Alps. Overcome with fear and despair, they did little until an officer found a map. Then they rallied, worked and finally found their way to safety. Only later did they learn that the map was of the Pyrenees, not the Alps.

Among other things, this story helps show why illusory confidence will often not be learned away by trial and error. Overconfidence *will* be eroded by negative feedback that is immediate and unambiguous. Weather forecasters, for example, learn to calibrate probabilities fairly well because they are engaged in repeat tasks with prompt feedback. In contrast, most of us operate in environments where the consequences of our actions rarely become evident immediately. If and when they do, there are multiple possible causes and explanations. In the face of ambiguity, illusions can persist if we are motivated enough to want to sustain them. It is often observed that high-ranking business executives can operate for long periods of time in settings with sufficiently fuzzy and delayed feedback from their choices and hence have ample room to maintain their personal and group myths.<sup>16</sup> So, I suspect, do lawyers and their clients.

So far, I have suggested that people often develop excess confidence in their explanations of situations and events. Their "schemas" and beliefs are stronger than they should be because confidence is energizing, lack of confidence debilitating. But this says nothing about the likely *content* of sense-making strategies. Here we can make a simple and intuitive leap. If strong inferences and beliefs are adaptive because they are stress-reducing and confidence-building, then the kinds of illusory inferences that are most likely to develop and persist are those that best play a similar motivational

14. On the influence of confidence within groups, see generally Paul Zarnoth & Janet A. Sniezek, *The Social Influence of Confidence in Group Decision Making*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 345 (1997).

15. It is related in KARL E. WEICK, *SENSEMAKING IN ORGANIZATIONS* 54 (1995).

16. In this sphere, the work of James G. March is particularly prominent. See, e.g., JAMES G. MARCH, *DECISIONS AND ORGANIZATIONS* (1988); Barbara Levitt & James G. March, *Organizational Learning*, 14 ANN. REV. SOC. 319 (1988); James G. March & Zur Shapira, *Managerial Perspectives on Risk and Risk Taking*, 33 MGMT. SCI. 1404 (1987).



role.

By far the favorite adaptive form of inference in the psychological literature is egotistical inference.<sup>17</sup> There is a strong self-serving bias to people's judgments and decisions. People need to see themselves as good and reasonable, and subconsciously distort evidence ("rationalize") with impunity to bolster or maintain a positive self-image. Because it goes to one's fundamental sense of identity, this is one kind of personal bias that I think properly deserves the word "myth." One tells stories to oneself that inflate feelings of efficacy and control, establishing a sense of identity less susceptible to the threats of the everyday world. That is why egos are so prickly, people so averse to criticism. The illusion of self-efficacy that people build in their lives is a buffer against anxiety; ego-threats attack that buffer and hence threaten to increase stress. Indeed, there is one strand of research in social psychology that sees self-esteem specifically as a "terror management" device.<sup>18</sup> High self-esteem, the proponents argue, leads to the feeling that one has an important influence and place in society. It even reduces the fear of death by allowing individuals to see themselves as part of something enduring.

The psychological literature offers other possible anxiety buffers as well. Another strong one, I suspect, is the illusion of normalcy. For a variety of reasons, people are inclined to interpret new data as consistent with their prevailing perceptions, not as requiring revision. Change is distracting and stressful. The first subtle signals of change, including those that suggest danger (what lawyers like to call "red flags"), are often ignored.<sup>19</sup>

Another intriguing body of research comes under the heading of

17. The classic account here is found in Anthony G. Greenwald, *The Totalitarian Ego: Fabrication and Revision of Personal History*, 35 AM. PSYCHOL. 603 (1980). I explored this phenomenon explicitly in Donald C. Langevoort, *Ego, Human Behavior, and Law*, 81 VA. L. REV. 853 (1995). As with overconfidence, there may be significant gender and cultural effects here: the illusion of self-efficacy is more pronounced in males, and observed less strongly in other cultures. However, we should be careful not to generalize too strongly here. See *id.* at 860 n.25.

18. See, e.g., Jeff Greenberg et al., *Why Do People Need Self-Esteem?: Converging Evidence that Self-Esteem Serves an Anxiety Buffering Function*, 63 J. PERSONALITY & SOC. PSYCHOL. 913 (1992); Sheldon Solomon et al., *A Terror Management Theory of Social Behavior: The Psychological Functions of Self-Esteem and Cultural Worldviews*, 24 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 93 (1991). Their work relates to the cultural theories made popular by Ernest Becker. See, e.g., ERNEST BECKER, *THE BIRTH AND DEATH OF MEANING* (1962).

19. Of interest to lawyers should be an account of the illusion of normalcy during the time leading up to the recall of the Ford Pinto after warning signs appeared regarding its fuel tank safety. See, e.g., Dennis A. Gioia, *Pinto Fires and Personal Ethics: A Script Analysis of Missed Opportunities*, 11 J. BUS. ETHICS 379 (1992).

“just world” thinking.<sup>20</sup> There is a documented tendency among a significant segment of the population to consider the world relatively “just” in terms of causes and consequences. On average—I doubt that many people would say always—good things happen to good people, bad things to bad. The obvious consequence is to judge a tragic situation by blaming the victim. This is a commonly observed phenomenon, for example, in rape cases. The standard explanation for the prevalence of this kind of thinking is specifically stress-related: such a belief, coupled with an egotistical self-concept, reduces the fear that bad things will happen to oneself.

A further possibility that I find particularly interesting—and quite important legally—has to do with trust and reliance. A common observation is that many people trust others, especially authority figures, to a greater extent than prudence would warrant. There is a good chance, then, that trust is motivated. One reason (among many, admittedly) has to do with the desire to displace the anxiety and potential for regret associated with an important decision by shifting both responsibility and potential blame to another. Patients’ faith in their doctors is a common illustration. I have suggested elsewhere that stockbrokers and investment advisers play a similar role, with an obvious temptation for the manipulation of trust.<sup>21</sup> Here we have an interesting confluence with the egotistic bias—those with the most self-confidence will be able to induce the most trusting behavior by others. There is also a comparable explanation for conformity: again, reducing anxiety by choosing to follow the lead of others, with the associated confidence-building cognition that they must know what they are doing.

I could go on, but I suspect that I have made the point. People’s sense-making strategies are often driven by a desire to see their world as more understandable, predictable and controllable than it really is. This does not mean that inferences become utterly unrealistic. There are strong limits to how much reality can be distorted by people who must function within social, institutional and marketplace constraints. But in ambiguous settings where one’s mind is free to engage in the

20. See, e.g., MELVIN J. LERNER, *THE BELIEF IN A JUST WORLD* (1981); KELLY G. SHAVER, *THE ATTRIBUTION OF BLAME: CAUSALITY, RESPONSIBILITY, AND BLAMEWORTHINESS* 132-34 (1985); Alan Lambert et al., *Perceptions of Risk and the Buffering Hypothesis: The Role of Just World Beliefs and Right Wing Authoritarianism*, 25 *PERSONALITY & SOC. PSYCHOL. BULL.* 643 (1999).

21. See generally Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics About Stockbrokers and Sophisticated Customers*, 84 *CAL. L. REV.* 627 (1996).

creative interpretation of events, illusions can be strong and persistent.

If our adaptation story is right, they are not necessarily such bad things, either—*on average*. Yet they do produce occasional bad, sometimes even disastrous, judgments. Moreover, something left unclear in the literature is whether the buffering function really just represses the anxiety, so that the more work the mind has to do to maintain the myth and fuel the confidence in the face of adverse feedback, the greater the toll in terms of stress-related physical and mental disorders.<sup>22</sup> At the very least, we should note a temporal dimension here: over time, with more and more feedback, the ease with which the mind can deflect negative attributions diminishes. So, too, with success; as one gains power and responsibility, it becomes harder to externalize blame. It would not be surprising, then, to find among those who have achieved much a gradual progression toward what Max Weber (with respect to cultural beliefs) called “disenchantment.” At some point, a person may finally see that the successes that he had turned into an inspiring story about merit were as much or more the product of luck. Whether this is simple maturation or something more threatening is hard to say. Many psychologists claim that society’s greatest realists are the moderately depressed.<sup>23</sup>

### *B. Group Myths and Illusions*

Sense-making is largely a social act. The story of the lost military patrol was really about group anxiety and group confidence, and a large amount of research in social cognition speaks to the processes of perception and inference among sets of individuals. The precise relationship between individual cognitions and group processes is highly contested among students of group and organizational behavior.<sup>24</sup> Still, it is common to see claims that the same kinds of heuristics, biases and other illusion-producing tendencies observed among individuals can also be observed in groups.<sup>25</sup> In fact, in many

22. The incidence of stress related disorders among high achievers is often noted. For a discussion of the pathologies of success, see generally CHARLES M. KELLY, *THE DESTRUCTIVE ACHIEVER: POWER AND ETHICS IN THE AMERICAN CORPORATION* (1988).

23. See, e.g., SUSAN T. FISKE & SHELLY E. TAYLOR, *SOCIAL COGNITION* 214-15 (2d ed. 1991).

24. See, e.g., Barry M. Staw & Robert I. Sutton, *Macro Organizational Psychology*, in *SOCIAL PSYCHOLOGY IN ORGANIZATIONS* 350 (J. Keith Murnighan ed., 1993).

25. See Norbert Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 *PSYCH. REV.* 687, 687 (1996).

instances, group settings have been shown to exacerbate or intensify these biases. Groups of individuals working together toward some aim face a variety of challenges that require strongly heuristic forms of behavior: they have to communicate information to each other, identify the nature of their task, assess costs, benefits and potential strategies, and arrive at some consensus for action. Groups will be more effective to the extent that there are common perceptions or inferences not subject to time-consuming and stressful renegotiation. Members risk exclusion if they introduce stressful dissonant information into a group setting once the group has implicitly agreed to think otherwise. This, in turn, leads to the suppression of information and ideas and cognitive conformity above and beyond what any individual acting alone might bring to the situation. Irving Janis became famous for terming this process "groupthink," which he and his colleagues explain explicitly as a stress reduction mechanism.<sup>26</sup>

For example, the bias toward optimism and self-efficacy has been shown to be even greater in groups than it is in individuals.<sup>27</sup> Groups edit out negative information in order to maintain cohesion; the information flow bias in favor of positive or reinforcing data intensifies the feeling of power and control among members. While this can, as Janis emphasizes, sometimes lead to poor decision-making, on balance the effect is quite positive. The stress reduction leads to better focus, concentration and persistence. By increasing confidence and sense of group efficacy, members are more likely to trust each other, rather than engage in the kinds of selfish behavior triggered by fear and anxiety. That, in turn, makes the group that much more effective—another self-fulfilling prophecy that can readily reinforce members' perceptions that they were right all along.

Sense-making accounts can be found in many other areas of social behavior. As put in a classic study by Gordon Allport and Leo Postman, rumors relieve "intellectual pressure" that arises because "we want to know the why, how and wherefore of the world that surrounds us . . . our minds protest against chaos."<sup>28</sup> This sense-making role has significant influence in organizational and market settings, where uncertainty is commonplace, rumors rampant and

26. IRVING L. JANIS, *GROUPTHINK* 9 (1982). For a more comprehensive study, see generally IRVING L. JANIS & LEON MANN, *DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT* (1977).

27. See, e.g., Chip Heath & Forest J. Jourden, *Illusion, Disillusion and the Buffering Effect of Groups*, 69 *ORG. BEHAV. & HUM. DECISION PROCESSES* 103 (1997).

28. GORDON W. ALLPORT & LEO POSTMAN, *THE PSYCHOLOGY OF RUMOR* 37 (1947).

confidence crucial.<sup>29</sup>

The role of myth is also prominent in the study of organizations. In one of the seminal articles in the “new institutional” sociology of organizations, John Meyer and Brian Rowan talk about myth and ceremony as common responses to the ambiguity and anxiety that firms face in settings where the right strategy is a matter of institutional guesswork.<sup>30</sup> Among the common “myths”—just as in classic cultural and religious myths—is the creation story: the account of how the organization came to be in a way that gives it a special sense of identity and purpose. Not surprisingly, the typical stories of “unique” organizational identity, of what makes the organization special and different, vary little from each other.<sup>31</sup> Yet they play important roles as guides to behavior. In their study of institutional investors, William O’Barr and John Conley argue that “founding stories” account for significant variations in how the institutions make investment decisions.<sup>32</sup>

Just like individuals, organizations are conformists. They pursue legitimacy in the eyes of key resource providers and hence take cues as to right behavior from others who have achieved an apparent level of success. The result is a “mimetic” process whereby common beliefs and practices diffuse among organizations.<sup>33</sup> While social conformity can be explained without resort to any strong cognitive element, sociology is increasingly willing to posit that people within organizations come to adopt beliefs heavily influenced by the desire to gain or preserve legitimacy. Because of this motivational influence, these beliefs need not track reality all that closely: there evolves only a “loose coupling” between organizational sense-making and objective evidence. These illusions are functional insofar as they motivate, protect against anxiety, and assist in creating group cohesion.

29. See generally Nicholas DiFonzo et al., *Reining in Rumors*, 23 *ORG. DYNAMICS* 47 (1994); Nicholas DiFonzo & Prashant Bordia, *Rumor and Prediction: Making Sense (but Losing Dollars) in the Stock Market*, 71 *ORG. BEHAV. & HUM. DECISION PROCESSES* 329 (1997).

30. See generally John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 *AM. J. SOC.* 340 (1977).

31. Job interviewees might take note that answers to the inevitable question “what makes your firm/law school/company different?” lead to very similar answers among firms, law schools and companies.

32. See generally WILLIAM O’BARR & JOHN M. CONLEY, *FORTUNE AND FOLLY: THE WEALTH AND POWER OF INSTITUTIONAL INVESTING* (1992).

33. See Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 *AM. SOC. REV.* 147, 151 (1983).

So far, the examples of social construction that we have examined are fairly benign. But if there is such a thing as group narcissism,<sup>34</sup> identity and performance myths may become self-serving in the same way that individual narcissism can blind people to the harms that they do to others. There are many studies in the social psychology of organizations of how in-group biases can lead to self-serving forms of inference. Of particular interest to lawyers, a fascinating set of papers shows how various aspects of employment and equal opportunity law have been construed by “human resource” professionals (including lawyers) in a way that serves the self-interest of those professionals.<sup>35</sup> While it would be easy to offer such an account purely in political terms—deliberate rent-seeking—I suspect that the professionals sincerely come to believe in their constructions, something that makes them more committed, confident and persuasive in the intensely political corporate world. One could tell a similar story about lawyers’ use of overprotective (and expensive) boilerplates in contract negotiations<sup>36</sup> and corporate lawyers’ commitment to the diffusion of antitakeover techniques like the poison pill,<sup>37</sup> which for whatever value they deliver to clients certainly increases the wealth of the professionals who design and implement them.

## II. SOME IMPLICATIONS

My claim so far boils down to the idea that people are inclined to make sense of their environment via creative interpretation, reducing the anxiety of uncertainty by imposing artificial and illusory coherence. Predictably, the explanations that are the most adaptive as sense-making devices are the ones that prompt useful forms of behavior (confidence, persistence, etc.) by operating as anxiety buffers.

34. See generally Andrew D. Brown, *Narcissism, Identity and Legitimacy*, 22 ACAD. MGMT. REV. 643 (1997); see also *infra* text accompanying notes 58-61.

35. See, e.g., Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401, 1417 (1990); Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC’Y REV. 47, 49 (1992).

36. See Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L.Q. 347, 348 (1996). See generally Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375 (1997).

37. See Michael J. Powell, *Professional Innovation: Corporate Lawyers and Private Lawmaking*, 18 LAW & SOC. INQUIRY 423, 423 (1993).

This triggers three almost scripted reactions among lawyers. The first is to point to the palpable prevalence of stress and anxiety in modern life as reason to doubt that any “buffers” exist or, if they do, work very well. That, however, misunderstands the nature of buffering. The world is an extraordinarily stress-producing place, often in ways too unambiguous to rationalize. What these psychological devices do is simply provide a mechanism for managing stress, deflecting that which can be put aside so that the task of dealing with what is left is more tractable. To use the story of the lost platoon once again, no doubt even with the illusion of a map the soldiers were anxious. The point is simply that without the map, the stress was that much greater, crossing the line from manageable to debilitating.

The second reaction is: “I knew that already. Tell me something new.” As I acknowledged at the outset, the common presence of cultural myths, with their anxiety-reducing role, is a standard intellectual insight. And most everyone has observed, in others at least, the everyday presence of rationalization, denial, egotism and other common tools of self-deception.

While many in the law-trained audience will thus say that they know that such cognitive mechanisms exist, I strongly suspect that most implicitly marginalize them. Biases, they say, are the stuff of weak-mindedness, observable among the general population but not among those who are smart and successful and acting in settings where good decisions “count.” Perhaps they help us understand foolish consumer behavior (gambling and smoking, for example), but in the Darwinian competition for survival in high-stakes games—the games lawyers and their well-heeled clients play—they simply can’t be of much importance.

That perception is, of course, a psychologist’s delight, for it is a perfect example of an egocentric tendency much the subject of classical myth—hubris. The striking insight from the sense-making literature is that distortions of reality, especially things such as overconfidence and over-optimism, are commonplace among skilled, educated people. And, even more counterintuitively, some of their success may actually be due to the *presence* of such myths and illusions. Myth-making is stable in an evolutionary sense even among the “fittest.”

Still, lawyers tend to resist this, especially within their own world. The in-group rhetoric of lawyering is extraordinarily rationalist, and that discourse cannot be abandoned without doing substantial

violence to the vanity embedded in the prevailing professional self-image. This, in turn, spills over into perceptions of and relationships with the larger world. Psychologists have identified a strong human tendency, termed the "false consensus effect," to overestimate the extent to which others share one's own attitudes, beliefs and inferences.<sup>38</sup> Interpersonal communication often fails because the speaker wrongly assumes a coincidence of beliefs and perceptions, and hence fails to do the work needed to understand, connect and persuade.<sup>39</sup> As we shall see later on, lawyers who project too much of their own myth of rationality onto others run the risk of failing to understand them, compromising their ability to advise or negotiate effectively.

The third predictable reaction is: "So what? Give me something normative." Depending on whose sense-making strategies we want to consider, there are many possible responses. The legal literature has begun to address some of these: a good example would be the recent coupling of articles by Jon Hanson and Douglas Kysar. They explore smokers' myths and the ability of tobacco companies to manipulate and extend them. Then, they offer a clear normative response: continued, if not greater, emphasis on enterprise liability.<sup>40</sup> Along very different lines, any significant look at the behavior of juries would want to consider their sense-making strategies: how jurors create mental "stories" as they confront evidence offered at trial, stories that produce coherence, but not necessarily accuracy. Psychologists Reid Hastie and Nancy Pennington have developed a celebrated and very helpful research program built around the "story model" of jury cognition.<sup>41</sup>

But I suspect that most of these still indulge the hubris previously observed, concentrating on the non-elite strata of society to find illustrations of illusory thinking for which to develop appropriate

38. See Gary Marks & Norman Miller, *Ten Years of Research on the False-Consensus Effect: An Empirical and Theoretical Review*, 102 PSYCHOL. BULL. 72, 72 (1987).

39. See Dale W. Griffin & Lee Ross, *Subjective Construal, Social Inference and Human Misunderstanding*, 24 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 319, 337-45 (1991).

40. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1468 (1999); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 707-09, 732-33 (1999). Some of my work in corporate and securities law extends similar insights about myths and illusions, with normative recommendations. See, e.g., Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 108, 171-72 (1997).

41. See Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520-21, 538 (1991).



legal responses. What I would suggest here is that lawyers look more closely at their own worlds for anxiety buffers and other forms of myth-thinking. With respect to my interests, that takes us to the world of corporate executives and corporate lawyers.

### *A. The Entrepreneurial Mind*

The most obvious connection between law and the kind of stress-deflecting cognitive distortions that we have identified has to do with risk-taking. At the risk of some oversimplification, the cognitive distortions we observe among successful segments of the population are those that create a heightened sense of confidence and control over the immediate environment. For all its positive pay-offs, this may blunt the perception of risk, leading to choices that sometimes cause harm. Buffered anxiety is not likely to produce prudence, especially when evaluated in hindsight.

While it is again tempting to pursue this normatively (it says much of use to tort law, I suspect), I am more intrigued by how a business lawyer, who by intuition or training is adept at identifying these kinds of myths among clients and adversaries, might use that skill. The obvious temptation would be to exploit them. In fact, one can look at the so-called “art” of sales and marketing as just that—the skill at finding and feeding other people’s illusions and getting their money before reality sets in.<sup>42</sup> The sale of a business at a high price is easier if the prospective buyers’ fantasies of competence, wealth and status are well-primed. The strong subconscious desire to trust in a business relationship can also be exploited by donning the external trappings of trustworthiness. Whether it is ethical to do these sorts of thing is an obvious and important question, though not one that raises any conceptually different issues from those in the well-played-out debate over gamesmanship and candor in negotiations generally.<sup>43</sup>

Because there will usually be lawyers on the other side, such manipulateness might be checked even when the opposing client is otherwise susceptible to influence. Of course, the Machiavellian lawyer could simply turn his art to opposing counsel, seeking to take advantage of the opponent’s ego or desire for status to drive a wedge

42. See generally ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* (1996).

43. See, e.g., Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1220-21 (1990); James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 929-31.

between the lawyer and his or her client's interests. I suspect that that happens more than we would like to admit. As is often made plain by those who teach negotiation skills to lawyers with a heavy dosage of psychology, the most important use of this training is defensive: learning how not to be taken advantage of in this fashion, by learning to recognize your own capacity to rationalize concessions.<sup>44</sup>

Serious discussion of influence activities by lawyers tends to stop with tactics directed toward the opposing side. But stopping here would be a serious mistake because it misses a more dimly illuminated aspect of sophisticated legal practice. At this point, I think, the relevance of mythic sense-making should shift to the negotiation of reality that occurs *between* lawyers and clients.

Imagine, for example, that a lawyer believes that her client, say a start-up entrepreneur seeking external financing, has an unrealistically optimistic sense of the prospects for his business. This is hardly a far-fetched example, for start-up entrepreneurs are a well-studied breed, prone toward greater over-optimism and illusions of control than the general population.<sup>45</sup> It is especially apt if we situate this client in Silicon Valley, perhaps the most fertile soil for the creation of contemporary American myths. A natural response, with a long pedigree in the literature on the lawyer as the "dispassionate counselor," is for the lawyer to undertake the task of turning the client into a realist and emphasize the need to bargain hard for "downside" risk protection. There are ample and sobering statistics, for example, on start-up fatalities. Indeed, lawyers do seem to relish throwing cold water on other people's hopes and dreams, which happens to be a good way of establishing their own superior sophistication and experience.<sup>46</sup> But I suspect that most successful

44. Robert Cialdini notes explicitly that his effort in writing about the psychology of influence was to enable people to resist influence tactics, but that the greatest interest in the book is on the part of those who wish to learn to manipulate others more effectively. Robert B. Cialdini, *Social Influence and the Triple Tumor Structure of Organizational Dishonesty*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 44, 44 (David M. Messick & Ann E. Tenbrunsel eds., 1996).

45. See, e.g., Lowell W. Busenitz & Jay B. Barney, *Differences Between Entrepreneurs and Managers in Large Organizations: Biases and Heuristics in Strategic Decision-Making*, 12 J. BUS. VENTURING 9, 15 (1997). A recent best-selling book about Silicon Valley entrepreneurs is filled with examples of very strong optimistic illusions. See generally PO BRONSON, *THE NUDIST ON THE LATE SHIFT AND OTHER TRUE TALES OF SILICON VALLEY* (1999).

46. This may simply be egotistical, but perhaps not entirely. A number of studies have suggested that negative or critical talk tends to be viewed as more intelligent than optimistic, positive talk. In situations where clients or principals have imperfect information on which to evaluate a person, that bias might matter. See Jeffrey Pfeffer & Robert I. Sutton, *The Smart-*

ones avoid doing this too strongly, for three reasons:

(1) Challenging someone's "illusions," especially early in a relationship, is rarely successful and tends simply to undermine the relationship. The threat closes lines of communication, and if strong enough, may even lead to termination of the relationship. The lawyer may lose a client who is looking for a teammate, not a critic.

(2) The over-optimism is probably going to be a necessary energy source if the business is to have much chance of survival. The risk of failure is reduced if the entrepreneurs have strong faith in their ability to succeed, and the lawyer does not want to discourage such faith. Indeed, some financiers may treat the presence of doggedly unrealistic optimism as something of a litmus test for providing the money in the first place, and the lawyer will not want to interfere with the client's ability to send the necessary signals.

(3) Just as important, but a bit more subtle, the blind faith itself may provide surplus capital on which to base the deal in question. Venture capital financing often leaves surprisingly little for the entrepreneur in terms of equity and control.<sup>47</sup> The residual equity interest is worth much more if viewed from behind rose-colored glasses. Without an optimistically skewed valuation by the entrepreneur, there might not be enough to offer the financing firm to induce them to take what they know, better than the entrepreneur, is risky. At the very least, the deal will probably come to fruition more smoothly if the entrepreneur has an inflated valuation of the residual.<sup>48</sup>

*Talk Trap*, HARV. BUS. REV., May-June 1999, at 135, 138.

47. There is a large amount of literature on the reasons for this, most of which sensibly explain the structures in economic terms. See, e.g., Bernard S. Black & Ronald J. Gilson, *Venture Capital and the Structure of Capital Markets: Bank Versus Stock Markets*, 47 J. FIN. ECON. 243, 244-46 (1998). However, note of over-optimism's possible influence has been taken. See Joseph Bankman, *The Structure of Silicon Valley Start-Ups*, 41 UCLA L. REV. 1737, 1764 (1994); Joseph Bankman & Ronald Gilson, *Why Start-Ups?*, 51 STAN. L. REV. 289, 291 n.3 (1999). Bankman and Gilson note an intriguing study showing that 1/3 of Silicon Valley engineers place themselves in the top five percent of that same group in terms of talent (ninety percent put themselves in the top 1/4). See Bankman & Gilson.

48. The economic roles of optimism and pessimism in negotiations is explored in Jennifer Gerarda Brown, *The Role of Hope in Negotiation*, 44 UCLA L. REV. 1661, 1674-78 (1997). To be clear, client over-optimism is not always value-adding, and often the lawyer will have to try to neutralize the bias. When the overly optimistic entrepreneur is a seller rather than a buyer (e.g., in a merger transaction involving the sale of a business), the inflated internal valuation may be a barrier to the deal. In that case, the lawyer faces the touchy task of making the client more "realistic." I suspect that this is an area in which many lawyers fare poorly, especially if they use purely rational, argumentative discourse in an effort to make their points. The "ex ante" point is the same: business lawyers, to be successful, must know how to deal with client illusions, which ever way they cut. For a discussion of the challenges that lawyers face when they try to challenge corporate myths, see generally Donald C. Langevoort, *The Epistemology*

This poses an interesting dilemma for practitioners. Less-than-full candor has significant benefits for the client: preserving the inflated but useful self-confidence, and minimizing transaction costs. The obvious cost to the client is some loss of autonomy, which may not be preserved without at the same time placing those benefits at risk. There is no easy way out,<sup>49</sup> and most lawyers by intuition and training are mal-adept at the interpersonal communication skills needed to even try mediating between myth and reality for a client. What is even more interesting, however, is the way in which the lawyer's own self-interest comes into play in addressing this dilemma.<sup>50</sup> Sometimes, to be sure, the lawyer wants a more realistic client, and I do not doubt that lawyers often usefully "debias" their clients. But not always. Indeed, at the risk of sounding a bit cynical, I would guess that an important "family secret" skill that defines many economically successful business lawyers is an ability to skew client beliefs when the situation warrants, creating illusions if necessary to meet specific needs and desires.<sup>51</sup> Savvy business lawyers often want to be known for the ability to get deals done,<sup>52</sup> and, given the well-known barriers to agreement in complex transactions,<sup>53</sup> deals will

*of Corporate-Securities Lawyering: Beliefs, Biases and Organizational Behavior*, 63 BROOK. L. REV. 629 (1997).

49. One way the lawyer might seek compromise is to set forth discussion of the downside risks in a way that treats them as "boilerplate" material that should not bother the client all that much. That, however, is just another form of deception: to be fully informed and decide what to bargain for (and how hard), the client needs information not only as to the possibility of risk, but also the likelihood. In other words, the truly informed client needs to come to grips that the risk of failure is a serious one for him or her.

50. On the problem of deceiving one's own clients, largely focusing on deceptions that are truly malicious, see generally Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990). On the temptation of lawyers to overstate legal risks to clients, for any number of self-serving or "utilitarian" reasons, see generally Langevoort & Rasmussen, *supra* note 36.

51. The possibility that lawyers engage in "snow jobs" with respect to their clients is observed in John Flood, *Doing Business: The Management of Uncertainty in Lawyers' Work*, 25 LAW & SOC'Y REV. 41, 63-66 (1991). The specific example given is the overstatement of the particular lawyer's expertise for handling a matter.

52. This reputational interest poses a challenge because it is also in the lawyer's self-interest to avoid blame when some event comes to pass that could have been prevented by either more skillful drafting or not doing the deal at all. See generally Kahan & Klausner, *supra* note 36; Langevoort & Rasmussen, *supra* note 36. In terms of this latter concern, lawyers have good reason to be nay-sayers or "deal killers." But I suspect that sophisticated clients with strong transactional needs sense this, and seek out lawyers with reputations as deal-promoters. Nay-sayers as lawyers (and there are many) are ones either without the savvy to sense this in the face of all the "negative" training lawyers receive or ones who are not repeat players in the deal-making business.

53. A good survey of the psychological barriers is Robert H. Mnookin & Lee Ross, *Introduction*, in BARRIERS TO CONFLICT RESOLUTION 3, 3 (Kenneth J. Arrow et al. eds., 1995). An excellent article on ways to "harness" overconfidence and self-serving bias via the greater use of contingent contracting is Max H. Bazerman & James J. Gillespie, *Betting on the Future*:

sometimes happen only because someone works hard to *sell* it to the parties. For the “deal flow” to keep moving, it sometimes takes a kind of salesman-like puffery with one’s own client. This might involve an illusion of comfort by obscuring low-level legal risks, or maybe priming the clients’ optimistic fantasies to inject an adrenaline shot of hunger for the deal.

The fear that lawyers do not always want a completely informed client is not entirely speculative. Return to Silicon Valley. An intriguing field study by legal sociologists Mark Suchman and Mia Cahill contends that although such lawyers formally take on entrepreneurs as clients, they in fact act almost as double agents, compromising vigorous advocacy of client interests in the name of getting the deal done and maintaining good relationships with financiers for future interactions.<sup>54</sup> Whether this is a problem worth worrying about is not entirely clear: if the clients are aware of what is happening before they retain the lawyers, this “mediator” arrangement may very much be in their best interests.<sup>55</sup> If there is less than informed consent, then we have an interesting issue. Suchman and Cahill claim that in acting as “proselytizers” for conventional ways of doing business in the Valley, the lawyers “tread[] near the boundaries of conventional legal ethics”<sup>56</sup> by downplaying the interests of individual clients, and hence we can at least wonder about the consent. If they are right in their concern, then we should also worry about how informed the clients are regarding the legal/business risks associated with the deals they seek.

At the same time, however, the authors note the same benefit from this sort of posture that we did: Silicon Valley lawyers are facilitating important economic transactions at lower cost and with less disruptive adversarial behavior than in most other settings. And this raises the question of whether the lawyers come to construe their own professional situation in a way that makes any sense of moral dilemma about how informed their clients really are disappear. These lawyers are fond of portraying themselves (aided and abetted

*The Virtues of Contingent Contracts*, HARV. BUS. REV., Sept.-Oct. 1999, at 155. That lawyers can play a useful role in minimizing these barriers is emphasized in Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77 (1997).

54. See Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 LAW & SOC. INQ. 679, 700-01 (1996).

55. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 525-26, 564 (1994).

56. Suchman & Cahill, *supra* note 54, at 701.

by legal journalists) as a new breed of more enlightened transactors, as much business advisers as legal advisers. They happily tell of the role they have played in the Valley's creation story. They probably do deserve a good round of applause, but this story—the belief that what they are doing is good, right and special—sounds suspiciously like a myth itself. That, in turn, leads us to lawyers' own myths, and the possibility that mythic sense-making can sometimes serve as a cover for self-serving behavior, or at least to deflect serious professional self-examination.

### *B. Myths and Ethics*

A robust area for research in social cognition has to do with ethics and altruism: why do people so often behave either well or poorly? Some of this research is optimistic. There are intriguing findings on moral development (that certain forms of learning can prompt more responsible behavior), and substantial emphasis is placed on the surprisingly powerful role that perceptions of fairness play in motivating behavior. Although the area is a highly contested one, there is evidence suggesting that trust and cooperation exist to a greater degree than can be explained by calculative "game theory" models of repeat play.<sup>57</sup>

At the same time, however, there are also darker findings. One line of research has to do with what might be termed hypocrisy—the tendency to act differently from the beliefs one espouses. The standard account of hypocrisy is that the behavior is shameful. A person deliberately adopts a benign public posture designed to inflate others' perceptions of him or her, while at the same time privately acting in a selfish fashion. The cognitive account is very different.<sup>58</sup> Most people are motivated to see themselves (not simply have others see them) as good, reasonable and responsible. That is generally good news, for their behaviors will often conform to this desired self-

57. See, e.g., Max H. Bazerman et al., *Can Negotiators Outperform Game Theory?*, in *DEBATING RATIONALITY: NONRATIONAL ASPECTS OF ORGANIZATIONAL DECISION MAKING* 78, 78 (Jennifer J. Halpern & Robert N. Stern eds., 1998); Colin F. Camerer, *Progress in Behavioral Game Theory*, 11 J. ECON. PERSP. 167, 169 (1997).

58. See generally C. Daniel Batson et al., *In a Very Different Voice: Unmasking Moral Hypocrisy*, 72 J. PERSONALITY & SOC. PSYCHOL. 1335 (1997); George Loewenstein, *Behavioral Decision Theory and Business Ethics: Skewed Trade-Offs Between Self and Others*, in *CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS*, *supra* note 44, at 214, 214. The self-serving inference bias is well-documented among lawyers, too. See Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979, 979-82 (1994); George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEG. STUD. 135, 140-41 (1993).

image. However, when there is enough ambiguity about what is right—a variety of possible inferences—the mind will often subconsciously construe the situation selfishly, creating a cover that allows the person to maintain consistency between the desired self-image and the taking of what would, to the external observer, be self-interested behavior.

That form of biased sense-making has been the focus, for instance, of experimental work on the subject of environmental responsibility. A commonly-observed form of hypocrisy is the person with progressive political attitudes who drives a gas-guzzling car like a sport utility vehicle. Researchers have come up with a fairly complex set of explanations for such behavior (some of which has to do with time-discounting, impulsiveness, loss aversion and a host of other biases), but a sizable part of it is creative rationalization. Max Bazerman and his colleagues summarize their research along the following lines:

One explanation for the relationship between self-ratings and assessment of the importance of the behaviors is that the self-serving bias enables subjects to believe that they are doing well relative to others on important activities (and that the ones they are not doing well on are not important). These biases may cause people to believe that their positive contributions to environmental issues are more important than the contributions of others. For example, a person who puts a lot of effort into recycling but refuses to take public transportation may justify this decision by taking the position that recycling is the most important aspect of addressing the environmental crisis. Again, the attitude/behavior gap results, in this case because there is ambiguity as to which behaviors are the most important in reality.<sup>59</sup>

One can, of course, extend this kind of reasoning to many other settings. To take the example of Silicon Valley lawyers, I suspect that they are highly motivated to develop creation stories that stress the special nature of the Valley in societal (not just personal) wealth-creation, the special role that lawyers have played in this development, and a causal connection between lawyers' playing a more intermediary than client-advocacy role and these socially important outcomes. This myth can offer a rationalization for a variety of personal wealth-producing behaviors (e.g., diminished

59. Max H. Bazerman et al., *Environmental Degradation: Exploring the Rift Between Environmentally Benign Attitudes and Environmentally Destructive Behaviors*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS, *supra* note 44, at 256, 264. For a discussion of further work, see generally Max H. Bazerman et al., *The Human Mind as a Barrier to Wiser Environmental Agreements*, 42 AM. BEHAV. SCIENTIST 1277 (1999).

advocacy in the interest of maintaining connections with venture capitalists, taking compensation from clients in stock options)<sup>60</sup> that uncommitted observers would find at least worthy of discussion. Once again, I am not saying that Silicon Valley lawyers are wrong: indeed, I am one of those who sees them in more ways than not as a model for good business lawyering. All I am saying is that Silicon Valley lawyers (and those who want to be like them) have come to believe a Silicon Valley Gilgamesh that, while grounded in empirical observation, is probably embellished in self-serving ways.

The underlying lesson is extraordinarily important to anyone who wishes to promote compliance with either law or ethics, and is grossly underappreciated by legal scholars. The prevailing view tends to say that law and ethics work very easily with highly socialized “good” citizens: the task is simply to formulate and communicate the appropriate expectations effectively. As to those who are not so well-socialized, there need to be carrots and (especially) sticks.

The cognitive account complicates this in interesting ways.<sup>61</sup> To be sure, there are people who are habitually virtuous. There are also people who are socialized in such a way to make them highly obedient to authority; so long as they are not subject to mixed signals from those in authority as to what is appropriate, they will conform to expectations. That is their way of reducing the anxiety that comes from assuming a greater measure of personal responsibility for one’s actions. But the great bulk of people, especially those who succeed in highly competitive environments, will filter legal and ethical expectations through individual or group lenses. For many, that filtration will involve an implicit and unconscious search for ways to maintain consistency between the desire to be good and the desire to be successful. This form of rationalization can readily blunt the power of “official” norms.

In an interesting line of empirical research, social psychologist Tom Tyler has looked at compliance with a variety of legal rules: tax, intellectual property, etc.<sup>62</sup> His work argues that traditional

60. Putting aside the conflict of interest questions, it should be clear that lawyers who have an equity interest in their clients have that much more motivation to encourage the optimism (not necessarily realism) of their clients.

61. For a suggestion that lawyers do poorly at understanding this, see Linda Klebe Trevino et al., *Managing Ethics and Legal Compliance: What Works and What Hurts?*, 41 CAL. MGMT. REV. 131 (1999).

62. See *supra* text accompanying note 7. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Tom Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT’L L. & POL. 219 (1997).



influences like probability of detection and severity of sanctions dominate only at relatively high numbers—far higher than society delivers in areas such as software piracy (making unauthorized copies) or, for that matter, most forms of misconduct short of murder. Below that, personal choices as to compliance are affected by the actor's evaluation of the *legitimacy* of the regulation. Of great importance here is the fairness of the norm, especially in terms of the process by which it was formulated and applied.

If that is right, the task of promoting “good” behavior by lawyers will be problematic on a number of grounds. Much of legal ethics is aspirational, and even the mandatory is grossly underenforced. There is ample room for people to come to believe that the probability of sanction from some unvirtuous course of action is small; they probably even underestimate what sanctions might occur. In this setting, the mind turns to testing the legitimacy of the expectation. Consciously or not, it becomes easy for many people to denigrate or distinguish the norm, especially when it has some ambiguity to it either as formulated or applied to the situation in which the lawyer finds himself. The rationalizations—which some psychologists call “intuitive lawyering”<sup>63</sup>—are familiar ones that we have all employed: everyone else is doing it, or would do it were they in my situation; I’m doing it for the greater good (i.e., when I’m more successful or powerful I’ll be “better” than others); I have no power over the situation; and so on.<sup>64</sup> What is important here is the creative tendency to develop illusory beliefs in which one has confidence to support the rationalization.

One can see here, for instance, the disturbing power of cynicism.<sup>65</sup> Cynicism is not so much a mode of thought of the morally bankrupt as it is a way that highly socialized individuals and groups try to maintain self-respect in the face of the pressure to succeed. For instance, a belief that the pronounced norms of legal ethics are the product of already wealthy and successful lawyers who themselves

63. See Roderick M. Kramer & David M. Messick, *Ethical Cognition and the Framing of Organizational Dilemmas: Decision Makers as Intuitive Lawyers*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS, *supra* note 44, at 59, 69.

64. See generally EXCUSES: MASQUERADES IN SEARCH OF GRACE (C. R. Snyder et al. eds., 1983).

65. For the suggestion that people often are overly cynical in their evaluations of others, see generally Chip Heath, *On the Social Psychology of Agency Relationships: Lay Theories of Motivation Overemphasize Extrinsic Incentives*, 78 ORG. BEHAV. & HUM. DECISION PROCESSES 25 (1999); Justin Kruger & Thomas Gilovich, “Naïve Cynicism” in *Everyday Theories of Responsibility Assessment: On Biased Assumptions of Bias*, 76 J. PERSONALITY & SOC. PSYCHOL. 743 (1999).

would not behave in accordance with their own dictates, especially if they were in “my” situation, can readily undermine the legitimacy of the stated norm, and trigger a cascade of implicit excuse-making. I suspect that many lawyers overestimate the self-serving behavior of other lawyers simply because the resulting impression facilitates rationalization in the face of intense competition. It is much like the tendency of people to believe that panhandlers usually lie about their claimed needs and tend to misuse money on alcohol or drugs. That belief is formed without anything more than anecdotal evidence in the way of empirical support. That such a belief is often strongly held suggests that its function may largely be to make subjects of requests feel better about keeping their money for themselves.

The implication of all this is fairly clear, and helps us understand why it is frequently so hard to get people to behave in the way legal or ethical rule-makers want. Intended audiences test expressed norms for legitimacy, and their evaluation is predictably self-serving. Target groups can easily develop mythic beliefs that effectively blunt the impact of the rule without much in the way of guilt. I suspect that this poses a severe problem in business firms. Rationally, as many companies have discovered, there are extraordinary costs associated with employee misbehavior in the form of fraudulent sales practices, etc. As a result, many firms invest heavily in compliance and ethics programs. But by all accounts, such programs are not easy to make effective.

There is an interesting story from Xerox Corporation, which has long had a thoughtful and well-funded ethics and compliance program, indeed something of a model. High level managers were sufficiently pleased with their system so they allowed a journalist an unusual level of access to sales and marketing personnel to observe true “customer orientation” at work.<sup>66</sup> Surprisingly, the reporter instead found an internal culture that clung to military and sports imagery, with not infrequent abuses of customer trust and substantial bragging about the “wins” in ritualistic group celebrations that followed a successful sales period.<sup>67</sup> The disconnect with the expressed norm, if true,<sup>68</sup> is striking. What was most interesting in the

66. See John M. Darley, *How Organizations Socialize Individuals into Evildoing*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS, *supra* note 44, at 13, 25.

67. The resulting book is DAVID DORSEY, *THE FORCE* (1994).

68. Obviously, journalists have their own self-serving forms of inference, perhaps “discovering” a state of affairs that is useful largely because it tells a marketable story. I will take an agnostic position about how much of the disconnect is real in the Xerox account. However, it at least rings true with my experience in other fields with high sales and marketing

account is the nature of the rationalization—the language and culture carefully framed the salesman-customer interaction as a game or battle voluntarily entered into by both sides, so that even an “aggressive” win was legitimately earned. That was a guilt-reducing frame. But why was the company’s announced (and presumably smart) policy of customer respect unable to reframe the norm?

The explanation is no doubt a complicated one, but two myth perceptions are likely, both driven by the promotion and compensation strategy common to Xerox and most other highly competitive firms of establishing strong rewards for meeting or exceeding gradually ascending sales quotas, and dealing harshly with those who fall short. One is cynicism, the belief—inaccurate, I suspect—that the company policy was just another form of advertising and spin, not meant to be taken seriously below. Another, consistent with Tyler’s view, is that such a policy was perceived as unfair and hence illegitimate by those who risk such serious personal loss under the prevailing compensation and promotion structure if they comply when others in the company do not. To those with reason to fear falling short absent aggressive steps, it becomes psychologically comforting to imagine that “everyone does it.” Once again, the important insight here is that such beliefs are formed not because they are accurate (they may or may not be), but because, on an individual or small group level, they are useful forms of rationalization to support the pursuit of success. There is an important message here for lawyers: Constructing an effective ethics/compliance program involves not only articulating goals and procedures, but also fighting the kinds of self-serving perceptions that threaten to undermine their legitimacy. That is more easily said than done, and is a task for which lawyers often are intellectually ill-equipped.

### III. POSTSCRIPT: MYTHS AND STORIES

If accuracy is nice but not necessary in sense-making, then what is necessary? The answer is, something that preserves plausibility and coherence, something that is reasonable and memorable, something that embodies past experience and expectations, something that resonates with other people, something that can be constructed retrospectively but also can be used prospectively, something that captures both feeling and thought, something that allows for embellishment to fit current oddities, something that is fun to

components (e.g., stockbrokers).

construct. In short, what is necessary in sense-making is a good story.<sup>69</sup>

Much of the foregoing has been cautionary rather than encouraging. Perhaps, then, we should end more hopefully by asking if there is something in the research on the psychology of sense-making that would constructively help teach us how to overcome the more dysfunctional forms of myth and rationalization that put such a hard protective coating over the pursuit of self-interest. For instance, we have learned that anyone who wishes to make legal or ethical norms effective must first persuade her often skeptical audience of their legitimacy, difficult sometimes as that might be. That involves more than articulating the norm, as if the reasons for following it are self-evident, something I suspect is lost on many rule-makers who fall prey to the false consensus effect and overestimate the extent to which others share one's own beliefs, thereby underestimating the challenge of interpersonal communication. The need to justify in anticipation of often self-serving popular skepticism is something that commentators on the "expressive" function of law have yet to explore in any depth.<sup>70</sup>

This is too large a task, and I know too little, to try to offer a thorough prescription. But one theme in the literature that is potentially helpful is the emphasis on the role of stories in effective sense-making and communication. I have no desire to revisit the controversy of recent years on story-telling in (or "as") legal scholarship. There is ample support from the social sciences, however, for the underlying idea that stories have a greater capacity to influence than more rational forms of discourse. That the most important cultural myths tend to be in the form of stories is long-recognized evidence of this.

No doubt much of it has to do with the affective response that good stories generate.<sup>71</sup> Such stories are told in such a way that they

69. KARL E. WEICK, *SENSEMAKING IN ORGANIZATIONS* 60-61 (1995).

70. See generally Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); see also Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 964 (1996). I do not want to be critical here. I agree completely with the idea that law can be important in social norm creation, but suspect that it is easy to underestimate the difficulty in communicating legal norms in a way that has substantial persuasive power. For a suggestion that the law of insider trading may actually serve as an example of savvy norm entrepreneurship because of the way the underlying story is presented to the public, see Donald C. Langevoort, *Rereading Cady, Roberts: The Ideology and Practice of Insider Trading Regulation*, 99 COLUM. L. REV. 1319, 1328-30 (1999).

71. See GARY KLEIN, *SOURCES OF POWER: HOW PEOPLE MAKE DECISIONS* 177-96 (1998). Klein's book emphasizes what much other recent research in judgment does: that there is an emotional "feeling" component to decision-making that has been underestimated in much

are easily remembered and shared with others. In emphasizing the role of stories in organizational cognition, Karl Weick tells of a nuclear power facility, Diablo Canyon in California, that like all others has a compelling organizational need to stress safety precautions, especially taking fairly small risks seriously.<sup>72</sup> That sort of thing could, and was, communicated dispassionately through lectures, training sessions and compliance manuals. One day a construction worker drove a Ford Mustang too fast near the facility, hitting a parked pick-up. The pick-up caught fire, starting a forest fire that for a time threatened to move dangerously close to the facility. Ultimately, no further harm was done. But the story lived on (probably embellished) in the facility's internal workplace culture, a readily communicated symbol of how big problems can come from small events. One suspects that the Mustang story is still worth more than a host of lectures.<sup>73</sup>

But how many lawyers would build a story like this into a compliance program? By nature, of course, business lawyers in their professional roles are lecturers and critics, not storytellers. There is a great faith in the ability to persuade—to create a sense of legitimacy for what others are expected to do—simply through formal declaration and argumentation, and I suspect that this compromises lawyers' effectiveness in generating desired behavior by others. I would guess that a good corporate lawyer, wanting to induce managers' compliance with norms of fiduciary responsibility, does much more by telling a story from some recent cases of the court's displeasure with another high level executive's bow to a comparable temptation than any systematic analysis of elements of the cause of action in evaluating breaches of fiduciary duty. Indeed, Ed Rock's recent survey of Delaware corporate law cases on shift-in-control

other work. He gives a vivid description of expertise in terms of "gut feelings," (i.e., visceral ways of sensing when something is amiss by telling the story of a firefighter who left a burning building just before the collapse of a floor simply on gut reaction, only later being able to articulate in more scientific terms why there was danger). *See id.* at 21-23.

72. *See* WEICK, *supra* note 69, at 130.

73. At Florida Power & Light, company managers once came upon a process that, in their view, created a higher level of productivity. They were sufficiently proud that they nominated themselves for the Demming Award, recognizes model forms of creative efficiency in American business. One of the inspectors, a Japanese businessman, came to review the application and, with a few deft questions, ripped apart the innovation. The good results, he concluded, were dumb luck. His pronunciation of this finding, however, was "You were rucky." To this day, we are told, the term "rucky" has become the code within the company culture for encouraging greater analytical care (and avoiding self-serving inference) in evaluating data. *See* Chip Heath et al., *Cognitive Repairs: How Organizational Practices Can Compensate for Individual Shortcomings*, 20 RES. ORG. BEHAV. 1, 6-7 (1998).

transactions is written *to be* a morality story, ideally suited for retelling to others.<sup>74</sup> I suspect, in fact, that the court's recitation of the facts involves an editing designed to sharpen the sense of drama and diminish ambiguity.

Without wanting to make any overly ambitious claim, there is an appealing connection between law and myth in suggesting that lawyers wishing to promote legal and ethical compliance by clients and other audiences (e.g., other attorneys) learn to find and use stories better than they currently do. In my work dealing with lawyers who assist in a client's fraud, a review of the prevailing rules, even a glimpse at social science research on complicity in wrongdoing, has at best a moderate impact on most audiences. Most inexperienced audience members cannot readily imagine actually encountering such a problem, and probably overestimate their ability to control the situation were they to encounter it. Better results come from having them think about Clark Clifford, the late, distinguished Washington lawyer who toward the end of his career became complicit, to some degree, in the BCCI banking scandal.<sup>75</sup> If they are not already familiar with Clifford, the audience can quickly see him as the embodiment of what most young lawyers want to be: powerful, admired and wealthy. They can connect with him, if by nothing but wishful thinking. From there, it is easy to set out the facts and pose the question of how, or why, the complicity followed. While a few might come away with the cynical conclusion that Clifford was basically venal and had masterfully fostered a contrary illusion over the course of his career, most will not. They will have to struggle with the issue, and in the process, I suspect, see the problem in some depth, emotionally as well as intellectually. Then we can get to the rules.

Once more, I will concede that there is nothing all that new here: the power of well-told stories is another trite insight of modern thought, well-incorporated in the law and literature genre of legal thinking. What is significant and interesting, to me at least, is simply how well it fits into our more general cognitive account of human sense-making. By and large, the narrative structure is well-suited to conveying the impression of the world as a more controlled,

74. See Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1047 (1997); see also Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1270 (1999).

75. See Donald C. Langevoort, *Where Were the Lawyers?: A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 77-78 (1993).

predictable place. But often the stories people tell to themselves and others are wrong, and for all their adaptiveness on average, myths can sometimes be too comforting or distracting. The point to end on is this: precisely because their myths are often so adaptive as anxiety buffers, people will not let go of them easily. Those who have to fight through other peoples' myths, as good lawyers are occasionally called upon to do, will often have to have a more compelling story than the one they want to displace.

